



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R04-OAR-2012-0237; FRL– 9787-6]**

#### **Approval and Promulgation of Implementation Plans; Tennessee; 110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to approve in part, and conditionally approve in part, the State Implementation Plan (SIP) submission, submitted by the State of Tennessee, through the Tennessee Department of Environment and Conservation (TDEC), to demonstrate that the State meets the infrastructure requirements of Clean Air Act (CAA or Act) for the 2008 8-hour ozone national ambient air quality standards (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure” SIP. On October 19, 2009, TDEC made a SIP submission to certify that the Tennessee SIP already contains provisions that ensure the 2008 8-hour ozone NAAQS are implemented, enforced, and maintained in Tennessee (hereafter referred to as “infrastructure submission”). On March 23, 2012, TDEC submitted a letter requesting conditional approval of the infrastructure submission with respect to the requirements in its SIP applicable to state boards. On October 4, 2012, Tennessee submitted a letter requesting conditional approval of infrastructure submission with respect to requirements in its SIP with respect to requirements applicable to its permitting

program for prevention of significant deterioration (PSD) increments. With the exception of elements pertaining to PSD increments and state board requirements, Tennessee's infrastructure submission, provided to EPA on October 19, 2009, addresses all the applicable infrastructure SIP requirements for the 2008 8-hour ozone NAAQS. At this time, there are no outstanding infrastructure submission requirements for Tennessee with respect to significant contribution to nonattainment or interference with maintenance of the 2008 8-hour ozone NAAQS.

**EFFECTIVE DATE:** This rule will be effective [insert 30 days after date of publication in the Federal Register].

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2012-0237. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Nacosta C. Ward, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9140. Ms. Ward can be reached via electronic mail at [ward.nacosta@epa.gov](mailto:ward.nacosta@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

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### **I. Background**

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that new NAAQS.

Section 110(a) of the CAA generally requires states to make a SIP submission to meet applicable requirements in order to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within 3 years following the promulgation of such

NAAQS, or within such shorter period as EPA may prescribe. These SIP submissions are commonly referred to as “infrastructure” SIP submissions. Section 110(a) imposes the obligation upon states to make an infrastructure SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the infrastructure SIP for a new or revised NAAQS affect the content of the submission. The contents of such infrastructure SIP submissions may also vary depending upon what provisions the state’s existing SIP already contains. In the case of the 2008 8-hour ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous ozone NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for infrastructure SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include basic structural SIP elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The applicable infrastructure SIP requirements that are the subject of this rulemaking are listed below.<sup>1</sup>

- 110(a)(2)(A): Emission limits and other control measures.

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<sup>1</sup>Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to other provisions of the CAA for submission of SIP revisions specifically applicable for attainment planning purposes. These requirements are: (1) submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA; and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today’s proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the nonattainment planning requirements of 110(a)(2)(C).

- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.<sup>2</sup>
- 110(a)(2)(D)(i)(II): Interstate transport (PSD and visibility prongs).<sup>3</sup>
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.<sup>4</sup>
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

On August 22, 2012, EPA proposed to approve Tennessee's October 19, 2009, 2008 8-hour ozone NAAQS infrastructure SIP submission except as it related to section 110(a)(2)(E)(ii), which EPA proposed to approve in part, and conditionally approve in part.<sup>5</sup> See 77 FR 50651.

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<sup>2</sup> This rulemaking only addresses requirements for this element as they relate to attainment areas.

<sup>3</sup> Today's final rule does not address section 110(a)(2)(D)(i)(I) (the significant contribution to nonattainment prong or the interfere with maintenance prong) for the 2008 8-hour Ozone NAAQS, which as described in greater detail below, EPA does not presently view as a "required submission" consistent with the D.C. Circuit Court's recent opinion in *EME City Generation v. EPA*, 696 F.3d 7, 31 (D.C. Cir. 2012). In that opinion, the D.C. Circuit Court concluded that a SIP submission to address section 110(a)(2)(D)(i)(I) for a new or revised NAAQS cannot be considered a "required" SIP submission until EPA has first defined a state's obligations pursuant to that section. See *EME Homer City*, 696 F.3d at 32 ("A SIP logically cannot be deemed to lack a 'required submission' or deemed to be deficient for failure to meet the good neighbor obligation before EPA quantifies the good neighbor obligation.")

<sup>4</sup> This requirement as mentioned above is not relevant to today's proposed rulemaking.

EPA proposed conditional approval in part for element 110(a)(2)(E)(ii) because, while Tennessee's SIP does not currently contain provisions to address the requirements of CAA section 128(a)(1), the State committed in a letter dated March 28, 2012, to submit, within one year, specific enforceable measures to EPA for incorporation into the SIP to address these requirements. EPA proposed approval of the state's infrastructure SIP submission in part, for section 110(a)(2)(E)(ii) because the State's implementation plan already contains adequate provisions to address the requirements of CAA section 128(a)(2). *See* 77 FR 50651; August 22, 2012.

With respect to the PSD requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (hereafter referred to as prong 3 of 110(a)(2)(D)(i)),<sup>6</sup> and 110(a)(2)(J) for the 2008 8-hour ozone NAAQS, EPA published a supplemental proposal on December 3, 2012. In this supplemental notice, EPA proposed conditional approval of Tennessee's infrastructure SIP submission for these elements of section 110(a)(2) for the 2008 8-hour ozone NAAQS.<sup>7</sup> *See* 77 FR 71568, December 3, 2012. As described in the supplemental proposal, on October 4, 2012, Tennessee submitted a request for conditional approval of the State's infrastructure SIP submission with respect to sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J), specifically as they

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<sup>5</sup> As discussed in the proposed rule for today's action, section 110(a)(2)(E)(ii) requires that the SIP include provisions necessary to meet the requirements of section 128 of the CAA. *See* 77 FR 50651.

<sup>6</sup> Section 110(a)(2)(D)(i) includes four requirements referred to as prongs 1 through 4. Prongs 1 and 2 are provided at section 110(a)(2)(D)(i)(I); prongs 3 and 4 are provided at section 110(a)(2)(D)(i)(II). Today's conditional approval only relates to the PSD requirements of section 110(a)(2)(D)(i)(II), also known as prong 3.

<sup>7</sup> EPA originally proposed approval of these elements as they related to PSD requirements. *See* 77 FR 50651. EPA is not taking action to finalize the proposed approvals for these elements, rather, EPA is today taking action to finalize conditional approval for these elements as they relate to PSD requirements based upon the December 3, 2012, supplemental proposal. *See* 77 FR 71568. As described in the December 3, 2012, supplemental proposal, Tennessee's SIP currently does not contain the requisite PM<sub>2.5</sub> PSD increments necessary to satisfy these requirements. Accordingly, EPA is finalizing a conditional approval of Tennessee's infrastructure SIP submission based upon the state's commitment to rectify this concern with respect to this structural deficiency in Tennessee's current PSD program.

relate to PSD program requirements and the State committed to address the SIP deficiencies by submitting specific enforceable SIP revisions to address PM<sub>2.5</sub> PSD increments. This letter of commitment meets the requirements of section 110(k)(4) of the CAA. Tennessee's October 4, 2012, letter can be accessed at [www.regulations.gov](http://www.regulations.gov) using Docket ID No. EPA-R04-OAR-2012-0237.

Finally, EPA notes that this final action on Tennessee's infrastructure SIP submission for the 2008 8-hour ozone NAAQS is required not only by section 110(k), but also by order issued by the U.S District Court for the Northern District of California in *WildEarth Guardians v. Jackson*, Case No. 11-CV-5651 YGR. In an October 17, 2012, order granting partial summary judgment in the case, as modified in a December 7, 2012, order granting in part EPA's motion for an amended order, that court directed EPA to take final action upon the infrastructure SIP at issue in this action by March 4, 2013. With respect to Tennessee, the court specifically ordered EPA to act upon the infrastructure SIP submission made by the state on October 19, 2009, as revised/withdrawn in part on July 3, 2012. The court specifically explained in the December 7, 2012, amended order that "EPA is being ordered to assess the *remaining* submissions, i.e., the revised SIP from Kentucky and the non-withdrawn portion of the Tennessee SIP." (emphasis in the original). Accordingly, EPA is taking final action upon Tennessee's infrastructure SIP for the 2008 8-hour ozone NAAQS in its revised form, which reflects Tennessee's withdrawal of the portion of the original submission intended to address section 110(a)(2)(D)(i)(I). As explained in more detail in response to relevant comments, EPA is addressing the requirements of section 110(a)(2)(D)(i)(I) consistent with the opinion of the D.C. Circuit Court's opinion in *EPA Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).

## **II. Response to Comments**

EPA received no comments on the initial August 22, 2012, notice proposing action on Tennessee's infrastructure SIP submission for the 2008 8-hour ozone NAAQS. EPA received two sets of comments on the December 3, 2012, supplemental proposed rulemaking in which EPA proposed conditional approval of the State's infrastructure SIP submission as meeting the applicable requirements of CAA sections 110(a)(2)(C) and (J), and prong 3 of section 110(a)(2)(D)(i) for the 2008 8-hour ozone NAAQS. A summary of the comments and EPA's responses are provided below.

EPA notes that the majority of the comments received are well beyond the scope of the supplemental proposal which addressed only certain issues associated with PSD rules as they impacted Tennessee's infrastructure submittal for CAA sections 110(a)(2)(C) and (J), and prong 3 of 110(a)(2)(D)(i), for the 2008 8-hour ozone NAAQS. Instead, the comments primarily concerned the interstate transport requirements of section 110(a)(2)(D)(i)(I) (prongs 1 and 2). These requirements were not at issue in either the original August 22, 2012, proposal notice, or the December 3, 2012, supplemental notice, because the State had by this point already withdrawn that portion of the infrastructure SIP submission that was intended to address section 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS. As the supplemental proposal specifically provided at footnote 5, EPA is not addressing section 110(a)(2)(D)(i)(I) requirements through this action. *See* 77 FR 71568, 71570. Even though EPA may not be obligated to respond to the comments outside the scope of the December 3, 2012, supplemental proposal, EPA nonetheless provides the following responses in order to assist in the public understanding of EPA's final action.



**Comment 1:** The Commenters contend that under section 110(k) of the Act, EPA must make a finding that Tennessee has failed to submit an interstate transport SIP to meet the requirements of infrastructure element 110(a)(2)(D)(i)(I) (prongs 1 and 2).

**Response 1:** EPA does not agree with the Commenter. As noted above, this comment is beyond the scope of the supplemental action proposed in the December 3, 2012, rulemaking, which was limited to the above-described PSD-related elements. Moreover, the D.C. Circuit Court's recent opinion in *EME City Generation v. EPA*, 696 F.3d 7, 31 (D.C. Cir. 2012), concluded that a SIP submission to address section 110(a)(2)(D)(i)(I) for a new or revised NAAQS cannot be considered a "required" SIP submission until EPA has first defined a state's obligations pursuant to that section. *See EME Homer City*, 696 F.3d at 32 ("A SIP logically cannot be deemed to lack a 'required submission' or deemed to be deficient for failure to meet the good neighbor obligation before EPA quantifies the good neighbor obligation.") On January 24, 2013, the D.C. Circuit issued an order denying all petitions for rehearing of the *EME Homer City* decision. At this time, however, the deadline for asking the Supreme Court to review the D.C. Circuit's decision has not passed and the United States has not yet decided whether to seek further appeal. In the meantime, and unless the *EME Homer City* decision is reversed or otherwise modified, EPA intends to act in accordance with the panel opinion in the *EME Homer City* opinion. Thus, although EPA historically has interpreted section 110(a)(1) of the CAA as establishing the required submittal date for infrastructure SIP submissions to address all of the "interstate transport" requirements in section 110(a)(2)(D), including the provisions in section 110(a)(2)(D)(i)(I) regarding significant contribution to nonattainment and interference with maintenance, it would not be consistent with the *EME Homer City* opinion for EPA to make a

finding that Tennessee has failed to make a SIP submission to address section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS at this time. *See* 78 FR 2882, 2884-85 (January 15, 2012) (explaining why EPA did not make findings of failure to submit with respect to 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS). Accordingly, EPA is not making a finding of failure to submit for section 110(a)(2)(D)(i)(I) for Tennessee for the 2008 8-hour ozone NAAQS at this time.

**Comment 2:** One Commenter contends that EPA must disapprove the section 110(a)(2)(D)(i)(I) portion of Tennessee’s submittal (referred to by the Commenter as the “good neighbor” provisions) because it fails to include adequate provisions to meet the requirements of this subsection.

**Response 2:** EPA does not agree with the Commenter. First, this comment is beyond the scope of the supplemental action proposed in the December 3, 2012, rulemaking, which was limited to the above-described PSD-related elements. Second, the element of the SIP submission to which the Commenter refers was withdrawn by Tennessee. On July 3, 2012, Tennessee withdrew the portion of its SIP submittal addressing 110(a)(2)(D)(i)(I). Thus, this portion of the submittal is no longer before EPA and the Agency does not interpret the CAA as requiring that EPA take action, either to approve or disapprove under section 110(k), on submissions not before EPA. EPA does not interpret the CAA to mandate that EPA take action on a submission that a state has withdrawn (i.e., withdrawing the request that EPA take action on the submittal). Third, as a result of the decision of the D.C. Circuit in *EME Homer City*, that court has concluded that states, including Tennessee, have no obligation to make a SIP submission to address section

110(a)(2)(D)(i)(I) for a new or revised NAAQS until EPA has first defined a state's obligations pursuant to that section.

As a result, EPA does not agree with the Commenter that EPA has an obligation to disapprove the 110(a)(2)(D)(i)(I) portion of the Tennessee SIP submittal that was withdrawn. The Commenter does not point to any statutory authority which requires EPA to disapprove a non-required SIP submission not presently before EPA, and for which a state has specifically requested that EPA not take action (by formally withdrawing the voluntary submission from EPA review).

In situations where all or a portion of a *required* state submission has been withdrawn following a section 110(k)(1)(B) completeness determination, the Agency has the authority to issue a finding that a state has failed to submit such required submission pursuant to section 110(k)(1)(B). In accordance with the requirements of section 110(c)(1)(A), such a finding of failure to submit a complete required SIP submission would trigger EPA's obligation to promulgate a federal implementation plan unless the state corrected the deficiency. As discussed above in the response to comment 1, however, it would not be consistent with the *EME Homer City* decision for EPA to make a finding of failure to submit for Tennessee with respect to section 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS at this time.

**Comment 3:** The Commenters contend that EPA lacks authority to approve or conditionally approve the balance of Tennessee's infrastructure SIP submission despite the State's withdrawal of the portion of the SIP originally submitted to comply with section 110(a)(2)(D)(i)(I). One Commenter contends that the "Clean Air Act gives EPA no discretion to approve a SIP without the good neighbor provision on the grounds that it intends to address Tennessee's [section]

110(a)(2)(D)(i)(I) obligations in a separate action. There is no separate action available to EPA under the Clean Air Act to address a state's failure to satisfy its good neighbor obligations aside from the promulgation of a Federal Implementation Plan within two-years pursuant to section 110(c)(1) of the Clean Air Act.”

**Response 3:** EPA does not agree with the Commenter. Section 110(k)(3) of the Act authorizes EPA to approve a plan in full, disapprove it in full, or approve it in part and disapprove it in part, depending on the extent to which such plan meets the requirements of the Act. Section 110(k)(4) of the Act explicitly authorizes EPA to use conditional approval, consistent with the parameters for such conditional approvals stipulated in that section. This authority to approve the States' SIP revisions in separable parts was included in the 1990 Amendments to the CAA to overrule a decision in the Court of Appeals for the Ninth Circuit holding that EPA could not approve individual measures in a plan submission without either approving or disapproving the plan as a whole. *See* S. Rep. No. 101-228, at 22, 1990 U.S.C.C.A.N. 3385, 3408 (discussing the express overruling of *Abramowitz v. EPA*, 832 F.2d 1071 (9th Cir. 1987)).

As such, the Agency interprets its authority under sections 110(k)(3) and (k)(4), as affording EPA the discretion to approve or conditionally approve individual elements of Tennessee's infrastructure submission for the 2008 8-hour ozone NAAQS, separate and apart from any action with respect to the requirements of section 110(a)(2)(D)(i)(I) with respect to that NAAQS. EPA views discrete infrastructure SIP requirements, such as the requirements of 110(a)(2)(D)(i)(I), as severable from the other infrastructure elements and interprets section 110(k)(3) as allowing it to Act on individual severable measures in a plan submission. In short, EPA believes that even if the SIP submission for section 110(a)(2)(D)(i)(I) were now relevant,

which it is not, it would still have discretion under section 110(k) to act upon the various individual elements of the state's infrastructure SIP submission, separately or together, as appropriate. The Commenters raise no compelling legal or environmental rationale for an alternate interpretation.

**Comment 4:** The Commenters contend that compliance with the Clean Air Interstate Rule (CAIR) is not relevant to Tennessee's obligation under the CAA to submit a SIP addressing the requirements of section 110(a)(2)(D)(i)(I) with respect to the 2008 ozone NAAQS.

**Response 4:** EPA agrees with the substance of this comment, but does not agree that it is relevant for this action. As described above, and in the supplemental proposal associated with today's action, EPA is not taking any action through this rulemaking with respect to Tennessee's obligations pursuant to section 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS; therefore, this comment is not relevant to today's action. As a general matter, however, EPA agrees that compliance with CAIR is not relevant to a state's obligations under section 110(a)(2)(D)(i)(I) for purposes of the 2008 8-hour ozone NAAQS. CAIR was promulgated by EPA in 2005 to address, for certain states, the requirements of CAA section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone and 1997 annual PM<sub>2.5</sub> NAAQS. *See* 70 FR 25162. EPA promulgated CAIR long before it promulgated the 2008 8-hour ozone NAAQS, and CAIR did not, in any way, address interstate transport requirements related to the 2008 8-hour ozone NAAQS.<sup>8</sup> For these reasons

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<sup>8</sup> Moreover, in its decision granting the petitions for review of CAIR, the D.C. Circuit held that compliance with CAIR did not constitute compliance with section 110(a)(2)(D)(i)(I) even for the NAAQS that were addressed by CAIR – namely the 1997 ozone and 1997 annual PM<sub>2.5</sub> NAAQS. *See North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

CAIR is not relevant to Tennessee's section 110(a)(2)(D)(i)(I) obligation with respect to the 2008 ozone NAAQS.

**Comment 5:** One Commenter notes that EPA proposed to conditionally approve certain portions of Tennessee's infrastructure SIP, while leaving other infrastructure elements to be addressed in a separate rulemaking. The Commenter contends that EPA "does not have the authority to approve some provisions of a SIP while deferring action on other mandatory provisions once the 12 month mandatory determination deadline to act on an administratively complete SIP submittal has run." The Commenter asserts that because Tennessee has withdrawn the "good neighbor" provisions of its SIP submittal, the submittal "fails to include adequate provisions 'prohibiting... any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will contribute significantly to nonattainment, or interfere with maintenance by, any other State' with respect to the 2008 8-hour ozone NAAQS." Therefore, the Commenter concludes, "EPA is required to disapprove the 'good neighbor' portions of the Tennessee SIP." The Commenter asserts that "[s]ince the statutory deadline has past under which EPA is required to act on the 2008 8-hour ozone NAAQS SIP submittals, EPA has no authority to indefinitely postpone ruling on all the required infrastructure SIP elements, including the 110(a)(2)(D)(i)(I) portions of Tennessee's SIP submittal." The Commenter asserts that this approach is consistent with the logic espoused in an October 17, 2012, court order granting partial summary judgment to the plaintiffs in the case *WildEarth Guardians v. Jackson*, Case No. 11-CV-5651 YGR.

**Response 5:** As an initial matter, EPA does not agree with the Commenter that it is prohibited from acting on portions of an infrastructure SIP submission on an element by element basis, or in whatever combination of elements that may be appropriate in a given action. As noted above, the language which Congress ultimately included in section 110(k) allowing EPA to approve a plan in full, disapprove it in full, or approve it in part and disapprove it in part was added to overrule the portion of the decision *Abramowitz v. EPA*, 832 F. 2d 1071 (9th Cir. 1987), which held that EPA could not approve individual measures in a plan submission without either approving or disapproving the plan as a whole. *See* S. Rep. No. 101-228 (1989), reprinted at 1990 U.S.C.C.A.N. 3385, 3402.

Further, the Commenter appears to misunderstand what actions EPA is now taking. EPA does not intend to “indefinitely postpone” action with respect to the other required elements of Tennessee’s infrastructure SIP submission for the 2008 8-hour ozone NAAQS. In the December 3, 2012, supplemental proposal, EPA explained that it had previously proposed approval, on August 22, 2012, for the majority of other sections of Tennessee’s 2008 8-hour ozone infrastructure SIP submission relevant to the applicable elements of section 110(a)(2). *See* 77 FR 50651. EPA is today finalizing its proposed approval of the infrastructure SIP submission for those other elements. Notably, the Commenter did not comment on the timing of EPA’s action with respect to these other sections of the Tennessee 2008 8-hour ozone infrastructure SIP submission at the time EPA proposed action on those sections. Therefore, the Commenter’s concerns regarding the timing of EPA’s action on these other elements are not properly raised in comments to the December 3, 2012, rulemaking which was limited to the PSD elements contained sections 110(a)(2)(C) and (J), and prong 3 of 110(a)(2)(D)(i).

In addition, EPA notes that the October 17, 2012, court order referenced by the Commenter was subsequently amended by the court on December 7, 2012, to extend EPA's deadline for action on the Tennessee submittal through March 4, 2013. In that amended order, the court also clarified that it intended EPA to act on Tennessee's October 19, 2009, as revised/withdrawn in part on July 3, 2012. The court specifically explained in the December 7, 2012, amended order that "EPA is being ordered to assess the *remaining* submissions, i.e., the revised SIP from Kentucky and the non-withdrawn portion of the Tennessee SIP." (emphasis in the original). Today's final action, approving in part and conditionally approving in part Tennessee's infrastructure SIP submission, in conjunction with the aforementioned determination not to issue a finding of failure to submit for section 110(a)(2)(D)(i)(I) at this time, consistent with the decision in *EME Homer City*, fully satisfy the Agency's obligations under the December 7, 2012, court order in *WildEarth Guardians v. Jackson*, with respect to the Tennessee SIP submittal at issue.

**Comment 6:** One Commenter argued that EPA should disapprove the SIP submission from Tennessee with respect to section 110(a)(2)(D)(i) for the 2008 ozone NAAQS because "EPA's own modeling conducted in support of the Cross State Air Pollution Rule ...identified Tennessee as a state which contributes at least one percent of the 2008 8-hour ozone NAAQS to Maryland's nonattainment." Thus, the Commenter argued that EPA's "delay in disapproving" the submission would adversely impact the ability of the State of Maryland to provide for attainment of the 2008 ozone NAAQS within that state, consistent with the statutory schedule for attainment of the NAAQS.



**Response 6:** EPA acknowledges the Commenter's concern that interstate transport of ozone and ozone precursors from upwind states to downwind states may have adverse consequences on the ability of downwind areas to attain the NAAQS in a timely fashion. It is for this reason that EPA attempted, through the Cross State Air Pollution Rule (CSAPR), to address emissions found to contribute significantly to nonattainment of, or interfere with maintenance of, the 1997 ozone NAAQS. The modeling done for CSAPR, however, did not address the 2008 ozone NAAQS and EPA did not, in the CSAPR itself or in the modeling done during development of the rule, draw any conclusions regarding interstate transport with respect to the 2008 ozone NAAQS. Moreover, the D.C. Circuit, in its recent decision vacating the CSAPR, held that states are not required to submit SIPs addressing the requirements of section 110(a)(2)(D)(i)(I) until EPA has quantified their obligation under that provision. *See EME Homer City*, 696 F.3d 7 (D.C. Cir. 2012). The *EME Homer City* decision was issued in August of 2012, and on January 24, 2013, the court denied all petitions for rehearing. At this time, however, the deadline for asking the Supreme Court to review the D.C. Circuit's decision has not passed and the United States has not yet decided whether to seek further appeal. In the mean time, and unless the *EME Homer City* decision is reversed or otherwise modified, EPA intends to act in accordance with the D.C. Circuit's opinion.

Finally, as the *EME Homer City* decision establishes that the Tennessee 110(a)(2)(D)(i)(I) SIP submission was optional, Tennessee remains free not to make such a SIP submission or to withdraw such a submission without penalty. Moreover, EPA has no authority to disapprove an infrastructure SIP submission which is no longer pending before the Agency or to find that a state failed to submit a SIP submission to meet the requirements of section 110(a)(2)(D)(i)(I) at this time under the *EME Homer City* decision.

### **III. This Action**

In this rulemaking, EPA is taking final action to approve Tennessee's infrastructure submission as demonstrating that the State meets the applicable requirements of sections 110(a)(1) and (2) of the CAA for the 2008 8-hour ozone NAAQS, with the exception of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) pertaining to PSD increments, and the portion of section 110(a)(2)(E)(ii) pertaining to section 128(a)(1) requirements. EPA is taking no action with respect to section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS in this rulemaking because no such action is required at this time for this State. EPA will be taking action on 110(a)(2)(D)(i)(I), if required, in a separate future action.

With respect to section 110(a)(2)(E)(ii) specifically pertaining to section 128(a)(1) requirements, EPA is finalizing a conditional approval for this portion of Tennessee's infrastructure SIP submission for the 2008 8-hour ozone NAAQS.

Today's final action to conditionally approve of the portion of element 110(a)(2)(E)(ii) related to the section 128(a)(1) requirements is based upon a March 28, 2012, commitment letter submitted by Tennessee to EPA. Tennessee's March 28, 2012, letter can be accessed at [www.regulations.gov](http://www.regulations.gov) using Docket ID No. EPA-R04-OAR-2011-0353. Through this letter, Tennessee committed to adopt specific enforceable measures to address current deficiencies in its SIP related to section 128(a)(1) requirements. This letter of commitment meets the requirements of section 110(k)(4) of the CAA, and as such, EPA is relying upon this commitment to conditionally approve section 110(a)(2)(E)(ii) as it relates to the requirements of section 128(a)(1) of the CAA. For more information, see EPA's proposal for today's

rulemaking. *See* 77 FR 50651. EPA has previously relied upon Tennessee's March 28, 2012, commitment to conditionally approve section 110(a)(2)(E)(ii) as it relates to the section 128(a)(1) for purposes of the 1997 8-hour ozone NAAQS. *See* 77 FR 42997 July 23, 2012. Pursuant to that earlier conditional approval, Tennessee is committed to providing EPA with the specified SIP revision by no later than July 23, 2013.

Accordingly, for purposes of today's conditional approval of section 110(a)(2)(E)(ii) as it relates to the requirements of section 128(a)(1), Tennessee must submit to EPA by July 23, 2013 (within one year from the date of publication for the final rule that EPA published on July 23, 2012, for the 1997 8-hour ozone NAAQS), a SIP revision adopting the specific enforceable measures related to CAA section 128(a)(1) as described in the State's commitment letter described above. If the State fails to submit this promised SIP revision by July 23, 2013, today's conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval.

With respect to the PSD requirements of elements 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i) and 110(a)(2)(J) for the 2008 8-hour ozone NAAQS, EPA published a supplemental proposal to conditionally approve Tennessee's infrastructure SIP submission, based upon the October 4, 2012, conditional approval request related to these elements for the 2008 8-hour ozone NAAQS. *See* 77 FR 71568. As described in the supplemental proposal, on October 4, 2012, Tennessee submitted a request for conditional approval of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) as they relate to PSD requirements and committed to address the SIP deficiencies by submitting specific enforceable SIP revisions to address PM<sub>2.5</sub> PSD increments within one year. This commitment letter meets the requirements of section 110(k)(4) of the CAA. Tennessee's October 4, 2012, letter can be accessed at

[www.regulations.gov](http://www.regulations.gov) using Docket ID No. EPA-R04-OAR-2012-0237. Today's action finalizes conditional approval of the infrastructure SIP submission for these sections of section 110(a)(2), based upon a commitment by Tennessee to submit the necessary SIP revisions to address PM<sub>2.5</sub> PSD increments. If the State fails to submit these promised SIP revisions by March 6, 2014 today's conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval.

#### **IV. Final Action**

EPA is taking final action to approve Tennessee's infrastructure submission, provided to EPA on October 19, 2009, because it addresses the required infrastructure elements for the 2008 8-hour ozone NAAQS with exception of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) as they relate to PSD requirements, section 110(a)(2)(E)(ii) as it relates to section 128(a)(1) requirements, and section 110(a)(2)(D)(i)(I) as it relates to interstate transport.<sup>9</sup> With the exceptions noted above TDEC has addressed the elements of the CAA 110(a)(1) and (2) SIP requirements pursuant to section 110 of the CAA to ensure that the 2008 8-hour ozone NAAQS are implemented, enforced, and maintained in Tennessee.

With respect to sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) as they relate to PSD requirements, EPA is taking final action to conditionally approve Tennessee's infrastructure SIP in part, based on an October 4, 2012, commitment that TDEC will adopt

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<sup>9</sup> As described in the response to comment 1 in Section II above, EPA does not presently view section 110(a)(2)(D)(i)(I) (significant contribution to nonattainment prong and interference with maintenance prong) for the 2008 8-hour Ozone NAAQS, as a "required submission" based upon the opinion of the D.C. Circuit in the *EME Homer* case.

specific enforceable measures related to PSD increments and submit these revisions as a SIP submission to EPA for approval into the Tennessee's SIP by March 6, 2014.

With respect to section 110(a)(2)(E)(ii) related to section 128(a)(1) requirements, EPA is taking final action to conditionally approve Tennessee's infrastructure SIP in part, based on a March 28, 2012, commitment that TDEC will adopt specific enforceable measures and submit these as a SIP submission to EPA for approval into the Tennessee's SIP by July 23, 2013, to address the applicable portions of section 128(a)(1).

If the State fails to submit these promised SIP revisions by the applicable dates described above, today's conditional approval of Tennessee's infrastructure SIP for the 2008 8-hour ozone NAAQS will automatically be disapproved for the element or elements that the state fails to address on that date and EPA will issue a corresponding finding of disapproval.

## **V. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule

or action. This action may not be challenged later in proceedings to enforce its requirements.

*See* section 307(b)(2).



## **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 27, 2013\_

A. Stanley Meiburg

Acting Regional Administrator,  
Region 4.

40 CFR part 52 is amended as follows:

## **PART 52-APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

### **Subpart RR—Tennessee**

2. Section 52.2219 is amended by adding paragraphs (c) and (d) to read as follows:

#### **§ 52.2219 Conditional approval.**

\* \* \* \* \*

(c) Conditional Approval—Submittal from the State of Tennessee, through the Department of Environment and Conservation (TDEC), dated October 4, 2012, to address the Clean Air Act (CAA) sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) for the 2008 8-hour Ozone National Ambient Air Quality Standards. EPA is conditionally approving TDEC's submittal with respect to the PSD requirements of CAA sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J), specifically related to the adoption of enforceable provisions for PSD increments as detailed in TDEC's October 4, 2012, commitment letter. Tennessee must submit to EPA by March 6, 2014, a SIP revision adopting specific enforceable measures related to PSD increments as described in the State's letter of commitment.

(d) Conditional Approval—Submittal from the State of Tennessee, through the Department of Environment and Conservation (TDEC), dated October 19, 2009, to address the Clean Air Act (CAA) section 110(a)(2)(E)(ii) for the 2008 8-hour Ozone National Ambient Air Quality

Standards. With respect to CAA section 110(a)(2)(E)(ii), specifically related to the adoption of enforceable measures contained in CAA section 128(a)(1), EPA published in the Federal Register a final rulemaking to conditionally approve TDEC's March 28, 2012, commitment on July 23, 2012. Tennessee must submit to EPA by July 23, 2013, SIP revisions adopting specific enforceable measures related to CAA sections 128(a)(1) as described in the State's letter of commitment.

3. Section 52.2220(e) is amended by adding a new entry "110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards" at the end of the table to read as follows:

**§ 52.2220 Identification of plan.**

\* \* \* \*

(e) \* \* \*

**EPA-Approved Tennessee Non-regulatory Provisions**

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State effective date	EPA approval date	Explanation
**	**	*	*	*
110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air	Tennessee	10/19/2009	[Insert date of publication in <u>Federal Register</u> ] [Insert citation of publication]	With the exception of section 110(a)(2)(D)(i)(I) concerning interstate transport; the portions of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i),

Quality Standards				and 110(a)(2)(J) related to PSD , which are being conditionally approved; and section 110(a)(2)(E)(ii) as it relates to section 128(a)(1), which is being conditionally approved
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[FR Doc. 2013-05112 Filed 03/05/2013 at 8:45 am; Publication Date: 03/06/2013]